

"Greening" Intellectual Property via Human Rights

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Elena Izyumenko, [*Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment*](#), 55 *Int'l Rev. Intell. Prop. & Competition L.* 864 (2024).

While climate change brings unprecedented consequences for the environment, impacting the life of everyone through natural catastrophes and the dramatic alteration of the living conditions in entire regions, increasing attention has been paid by scholars in recent times to intellectual property and particular how it should be rethought to foster -or at least not to hinder- innovations that would have positive impact on the environment. In this context, calls for more sustainable intellectual property legislation and judicial applications thereof have become frequent.

In this context, Elena Izyumenko's new article, *Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment*, is particularly timely and explores ways that sustainable development and environmental concerns could be better integrated within the intellectual property framework.

The originality of Izyumenko's research lies in her proposal to use the human right to a healthy environment to reshape the contours of copyright and trademark law. While the use of human rights to rethink IP law is not new and constitutional concerns about certain developments in IP law have led to the emergence of an entire body of scholarship and case law on the interface of IP with human rights,¹ Izyumenko's is the first article that analyzes the emerging right to healthy environment and its potential consequences for our understanding of IP rights.

Izyumenko acknowledges that at the international level the human right to a healthy environment is still in the making, since the main international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights do not explicitly include it in their catalogue of rights. However, she provides convincing examples taken from European and national constitutional practices to show how this "new generation" human right is gaining legal weight, both by "greening" more established human rights and by establishing a self-standing human right.

In support of the first approach, the article refers to a groundbreaking development in a recent decision of the Grand Chamber of the European Court on Human Rights, where the Court ruled that the "human right to private and family life includes individuals' entitlement to effective protection from the serious adverse effect of climate change by State authorities". (P. 882.) Other national courts in Europe had also previously grounded the right to a healthy environment in the protection of the right to life and physical integrity or in the right to private and family life.

The European Union has gone one step further in recognizing in its Charter of Fundamental Rights adopted in 2000 a specific self-standing human right entitled "environmental protection" (Article 37). The extent of the legal effect of this provision has been subject to debate, since it is formulated as a legal principle addressed to the EU institutions rather than a right. But Izyumenko cites several opinions of different Advocate Generals of the Court of Justice of the EU where Article 37 was elevated to "a right

to environmental protection”. She thus concludes that the self-standing right to a healthy environment “is likely to soon play a more prominent role in the European legal landscape, including in the case law of the CJEU”. (P. 887.)

The core of the article’s argument is that current IP laws often fail to take sufficiently into account sustainability goals, in particular since pro-rightholders maximalist judicial interpretations of copyright and trademark law can significantly hinder repair, refurbishment and upcycling businesses. The author discusses the narrow current understanding of certain doctrines such as trademark and copyright exhaustion, which has been held by some courts not to cover altered goods or copies of the work, thus limiting the possibility to repair, refurbish, or upcycle broken or worn-out items. She then looks at other possible ways to legitimize these uses via trademark or copyright exceptions, demonstrating that in the absence of a general fair use exception such as in the US, the EU legal framework offers only limited immunity. Izyumenko proposes several possible fixes, including a change in approach by the CJEU to clarify that a trademark-protected sign might be considered non-distinctive in the context of repair, refurbishing or upcycling.

More broadly, Izyumenko proposes to reconcile IP protection with the human right to a healthy environment by using this emerging right to generate “environmental-friendly” interpretations of IP laws—to redefine the scope both of protection and of exceptions. Where this is not possible, an external application of the right to a healthy environment to IP should be encouraged, even if this would require establishing difficult “causal links between the IP-imposed restrictions on the business and the ultimate negative effects on the environment”. (P. 895.)

Admittedly, the proposals might resonate more to a European readership since European courts have already for many years used human rights arguments to remodel the boundaries of IP protection. It can be regretted that other IP rights such as patent law or design law have not been included in the scope of the article to make a more horizontal statement with regard to the necessity to “green” IP through the use of the right to a healthy environment. Nevertheless, this article is an important step toward both the proposal of an ethical and sustainable IP framework² and the expansion of human rights arguments to further “constitutionalize” IP law through a holistic approach that integrates environmental issues.

1. See on the issue **The Interface of Intellectual Property Law with other Legal Disciplines** (Christophe Geiger, ed 2025).
2. For further reflections on this important issue, see the contributions in **Intellectual Property, Ethical Innovation and Sustainability** (Christophe Geiger ed., forthcoming).

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